

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1078**

In the Matter of the Civil Commitment of:
Richard Russell Fageroos.

**Filed March 8, 2021
Affirmed
Gaïtas, Judge**

Commitment Appeal Panel
File No. AP19-9073

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Considered and decided by Gaïtas, Presiding Judge; Connolly, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Richard Fageroos challenges the denial of his petition for transfer, provisional discharge, or full discharge from indeterminate civil commitment to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person. We affirm.

FACTS

In August 2006, appellant was committed to the MSOP as a sexually dangerous person (SDP) for an indeterminate period of time. Appellant's civil commitment stemmed from his criminal history and uncharged allegations of domestic assault and criminal sexual conduct.¹ His criminal history includes a 1991 conviction for kidnapping—which notably was part of a plea deal that led to the dismissal of a third-degree criminal sexual conduct charge—and two convictions from 1992 for first-degree burglary and first-degree criminal sexual conduct. Following his commitment, appellant refused to participate in MSOP treatment and was eventually transferred to the Department of Corrections. He remained in prison for about five years before being transferred back to MSOP in 2011.

In May 2018, appellant petitioned the civil commitment Special Review Board for a transfer to community preparation services (CPS), or in the alternative, for either a provisional discharge or full discharge from his civil commitment. The Special Review Board held a hearing and subsequently issued findings of fact and a recommendation that appellant's petition be denied in its entirety. Appellant then timely filed a petition for rehearing and reconsideration of the Special Review Board's findings and recommendation.

The Commitment Appeal Panel (CAP) took review and held a hearing on appellant's petition in March 2020. During the hearing, appellant called the court-appointed psychologist to testify as a witness and offered one exhibit, a 28-page report

¹ Appellant's ex-spouse testified to the uncharged allegations in a hearing leading up to the district court's order for civil commitment.

written by the psychologist. The psychologist had diagnosed appellant with (a) “Other Specified Paraphilic Disorder, Non-Consenting Females, In a Controlled Environment”;² (b) “Other Specified Personality Disorder, with Antisocial Features”; and (c) “Alcohol Use Disorder, Moderate to Severe, In Remission, In a Controlled Environment.” Her report stated that appellant “actively rejects his current diagnoses” and “remains an untreated sex offender despite his continuous placement in highly structured and secure environments (i.e., prison, MSOP) for the past 27 years.” The psychologist testified that the “two primary drivers” for appellant’s past sexual misconduct, sexual deviance, and antisocial tendencies, have not been addressed during appellant’s civil commitment because appellant has refused to participate in MSOP sex-offender treatment. She opined that appellant would not succeed if transferred to CPS and noted her opposition to a provisional or full discharge.

Appellant also testified at the hearing. He testified that he has changed over the years, insisting that he is more empathetic, less combative, and that he avoids “drama.” He emphasized that he has remained sober for the last 29 years, and if released into the community, he would continue to abstain and would be open to attending Alcoholics Anonymous. Appellant stated that he takes responsibility for the sexual offenses he committed in the past. He denied any notion that he currently poses a danger to society. Appellant testified that he could succeed in the community because he has a good support system and would find employment. According to appellant, he does not need inpatient treatment. And he characterized the treatment available at MSOP as “ineffective.”

² According to the psychologist, paraphilic disorders refer to “sexual interests, urges, or behaviors that an individual experiences that are considered outside of the norm.”

Both the commissioner of human services and an assistant county attorney appeared on behalf of the state. The commissioner offered various MSOP reports and assessments into evidence, fifteen exhibits in total, for the CAP to consider in reviewing appellant's transfer request. At the close of the evidentiary phase of the hearing, the commissioner, joined by the county, moved to summarily dismiss appellant's petition under Minnesota Rule of Civil Procedure 41.02(b)³ for failing to support the requested transfer, provisional discharge, or full discharge. The CAP later issued its written order granting the motion to dismiss appellant's petition in its entirety.

This appeal follows.

DECISION

Appellant's brief to this court seemingly raises two issues. First, as a threshold consideration, appellant seems to argue that the procedures for challenging continued civil commitment, which are set forth by Minnesota Statutes, are unconstitutional. Second, appellant makes a general challenge to the CAP's rejection and summary dismissal of his petition.

I. We decline to address appellant's constitutional challenge to Minnesota's SDP statutes because appellant failed to adequately brief the issue.

By statute, a person

seeking discharge or provisional discharge [from commitment
as SDP] bears the burden of going forward with the evidence,

³ As we discuss in more detail below, when a petitioner moves for discharge from MSOP, the petitioner must first satisfy a threshold burden of production during a "first-phase hearing." At the close of the first-phase hearing, the commissioner may move to dismiss the petition under rule 41.02(b). *See Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013).

which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief. If the petitioning party has met this burden, the party opposing discharge or provisional discharge bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied.

Minn. Stat. § 253D.28, subd. 2(d) (2018). Appellant asserts that the statute violates “[b]asic notions of fair play and liberty interests” by placing an initial burden of production on a petitioner seeking discharge because it “fosters a statutory presumption for commitment and confinement and [is] against our nation’s long-held belief that the default state of people is liberty.” We interpret appellant’s position as a challenge to the constitutionality of the procedures outlined under the civil-commitment statutes, specifically the statutes regarding petitions for discharge or provisional discharge from commitment as SDP.

Generally, appellate courts reject challenges to the constitutionality of statutes, including commitment statutes, “unless the challenging party demonstrates that [a statute] is unconstitutional beyond a reasonable doubt.” *In re Poole*, 921 N.W.2d 62, 69-70 (Minn. App. 2018) (quotation omitted). And appellate courts may decline to consider inadequately briefed questions. *State Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997); see *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 654 (Minn. App. 2017) (applying *Wintz* in a civil-commitment matter), *review denied* (Minn. June 20, 2017). Here, appellant provides nothing more than the generalized claims of unconstitutionality mentioned above. Appellant does not support his assertions with an

actual argument. Absent adequate briefing of the constitutional issue here, we decline to address it.

II. The CAP did not err in summarily dismissing appellant's petition for discharge.

Next, appellant argues that “[t]he [CAP] erred when it found that [he] had not established a prima facie case for discharge as a matter of law because [he] produced competent evidence that his provisional discharge should be granted to begin to integrate him back into the community.” The CAP dismissed appellant’s petition under Minnesota Rule of Civil Procedure 41.02(b), concluding that appellant failed to establish a prima facie case for relief. “[W]hen a [CAP] dismisses a petition under Minn. R. Civ. P. 41.02(b), the appropriate standard of appellate review is de novo.” *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

Appellant petitioned for provisional or full discharge. A provisional discharge is essentially a reduction in custody during which the individual must abide by the terms and conditions of a provisional discharge plan, which is developed and monitored by MSOP and any other designated agency. *See* Minn. Stat. § 253D.30. A full discharge effectively terminates an individual from civil commitment when they are no longer in need of treatment and supervision or the period set by the original civil commitment order has run its course. *See* Minn. Stat. § 253D.31.

When a petition for full or provisional discharge comes before the CAP, the committed person “bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled

to the requested relief.” Minn. Stat. § 253D.28, subd. 2(d); *Coker*, 831 N.W.2d at 485-86. The petitioner must satisfy this threshold burden by producing “sufficient, competent evidence that, if proven, would entitle the petitioner to relief.” *Coker*, 831 N.W.2d at 486 (quotation omitted). This occurs during a “first-phase hearing.” *Id.* If satisfied, the CAP then proceeds to a “second-phase hearing” wherein the respondent “bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied.” *Id.* at 486 (quotation omitted).

If, however, the respondent moves for a rule 41.02(b) dismissal of the petition at the close of the first-phase hearing—as the commissioner did here—the CAP may dispense with the need for a phase-two hearing if the CAP concludes that the petitioner failed to make a *prima facie* case for the relief sought. *See id.* at 491. When considering a motion to dismiss a discharge petition, the CAP must view the evidence in the light most favorable to the petitioner and should refrain from weighing the evidence or making credibility determinations. *Id.*

We first consider the CAP’s denial of appellant’s request for provisional discharge, given that “the criteria for a provisional discharge are more lenient than the criteria for a [full] discharge.” *Larson*, 847 N.W.2d at 535. A petitioner who is civilly committed as a SDP “shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253D.30, subd. 1(a). This determination is made by considering two factors: “(1) whether the committed person’s course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person’s current treatment setting” and

“(2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.” *Id.*, subd. 1(b); *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995) (noting that “a slight change or improvement in the person’s condition is not sufficient to justify discharge”). A petitioner’s own self-serving testimony, without more, is insufficient to satisfy the threshold burden of production. *See Poole*, 921 N.W.2d at 68 (explaining that acceptance of uncorroborated assertions of a petitioner would cause the first-phase hearing to “devolve into committed persons reciting conclusory and formulaic testimony” in order to obtain a second-phase hearing, essentially by “uttering magic words”).

After thorough review, we conclude that the CAP properly viewed the evidence in the light most favorable to appellant and did not weigh the evidence or make credibility determinations when considering appellant’s request for provisional discharge. The CAP ruled that appellant’s submissions showed that appellant presents a risk of recidivism because he remains untreated and is still “entrenched in antisocial and criminal thinking patterns [that] will prevent him from adjusting to the community.” And the CAP appropriately declined to accept appellant’s own testimony as the only support for his petition. Accordingly, the CAP determined that “[n]o competent evidence has been presented to establish that [appellant] no longer needs supervision in his current treatment setting” and that appellant “ha[d] not made a prima facie showing that he has a provisional discharge plan that [would] provide a reasonable degree of protection to the public and enable him to adjust successfully to the community.” The CAP’s determinations are amply

supported by the record and appellant has put forth no argument to otherwise persuade us. Thus, the dismissal of appellant's petition for provisional discharge for failure to make a prima facie case for that relief was not erroneous.

Further, because appellant failed to satisfy his burden of production at the phase-one hearing as to provisional discharge, the summary dismissal of his request for full discharge, under a more demanding standard, logically follows. *See Larson*, 847 N.W.2d at 535-36. We therefore need not separately address the issue of full discharge.

III. The CAP did not err in rejecting appellant's transfer request.

Finally, although appellant's brief does not explicitly challenge the CAP's rejection of his transfer request, we briefly review the issue in the interests of justice because the CAP issued detailed findings regarding the transfer request, and respondent's brief to this court addresses the issue. *See* Minn. R. Civ. App. P. 103.04; *MacDonald v. Brodkorb*, 939 N.W.2d 468, 474 (Minn. App. 2020) (“[W]e may review forfeited issues as the interests of justice require.”).

Appellant petitioned for a transfer from a secure treatment facility to CPS, which is a nonsecure environment. To prevail on a transfer petition brought before the CAP, a petitioner “must establish by a preponderance of the evidence that transfer is appropriate.” Minn. Stat. § 253D.28, subd. 2(e). The appropriateness of a given transfer request turns on an evaluation of certain statutory factors:

- (1) the person's clinical progress and present treatment needs;
- (2) the need for security to accomplish continuing treatment;
- (3) the need for continued institutionalization;
- (4) which facility can best meet the person's needs; and

(5) whether transfer can be accomplished with a reasonable degree of safety for the public.

Minn. Stat. § 253D.29, subd. 1(b). At the end of the hearing, any party opposing the petition for transfer may move to dismiss the petition under Minn. R. Civ. P. 41.02(b) “on the ground that upon the facts and the law, the [petitioner] has shown no right to relief.” *See Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014). “But, unlike a discharge petition, a petition for transfer imposes the burdens of production and persuasion on the petitioner at the hearing before the judicial appeal panel.” *Id.* (citing Minn. Stat. § 253D.28, subd. 2(e)).

Here, although the CAP’s order ultimately dismissed appellant’s petition “in its entirety” under rule 41.02, the CAP also made thorough, detailed findings of fact based on the evidence received during the hearing on appellant’s petition, and it concluded that appellant did not meet the statutory criteria for transfer. This suggests that the CAP acted as the trier of fact regarding appellant’s transfer request and determined that appellant had not satisfied his burden. “[W]e will not reverse a CAP’s decision on a petition for a reduction in custody so long as the underlying findings are supported by the evidence as a whole.” *In re Civil Commitment of Edwards*, 933 N.W.2d 796, 803 (Minn. App. 2019), *review denied* (Oct. 15, 2019); *see Foster*, 857 N.W.2d at 548 (clarifying that when the appeal panel sits as trier of fact and renders judgment in written findings, we review those findings for clear error). In particular, the CAP’s findings are largely based on the psychologist’s testimony, clinical diagnoses, and her ultimate opinion that appellant would not be successful if granted a reduction in custody. *Cf. In re Civil Commitment of Crosby*,

824 N.W.2d 351, 356 (Minn. App. 2013) (noting that when findings of fact “rest almost entirely on expert testimony” the evaluation of credibility is particularly significant), *review denied* (Minn. March 27, 2013). Appellant has not shown that the CAP’s findings of fact are clearly erroneous. *See Loth v. Loth*, 35 N.W.2d 542, 544 (Minn. 1949) (holding that “error is never presumed” on appeal). Moreover, the CAP’s findings of fact are indeed supported by the record. *See Wilson v. Moline*, 47 N.W.2d 865, 870 (Minn. 1951) (stating that the function of an appellate court “does not require [it] to discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court’s findings” and that the court’s “duty is performed when [it] consider[s] all the evidence . . . and determine[s] that it reasonably supports the findings”); *Cook v. Arimitsu*, 907 N.W.2d 233, 240 n.3 (Minn. App. 2018) (applying this aspect of *Wilson*).

But even if we interpret the CAP’s order as dismissing the transfer request as a matter of law under rule 41.02(b)—despite the CAP’s extensive factual findings—our decision remains the same. We review a summary dismissal of a transfer petition under rule 41.02(b) de novo. *See Edwards*, 933 N.W.2d at 802-03. Here, where appellant offered no evidence supporting his transfer request beyond his own self-serving testimony, the facts and the law established no right to relief. *Poole*, 921 N.W.2d at 68 (“Generally, courts have ruled that mere conclusory assertions are insufficient to avoid an adverse ruling.”). Thus, appellant’s transfer request was legally deficient, justifying dismissal under rule 41.02(b).

Affirmed.